IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 476.

BRYANT McQUILLEN, ET AL.,
Petitioners,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Respondents.

BRIEF ON BEHALF OF THE NATIONAL CASH REGISTER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

JAMES PIPER,
Counsel for Respondent,
The National Cash Register Company.

R. DORSEY WATKINS,
of the Baltimore, Md., Bar,

CHAUNCEY B. GARVER,
of the New York Bar,
Of Counsel.

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Scope of Brief.

This case was begun in the District Court of the United States for the District of Maryland as a minority stockholders' suit. From the beginning the corporate defendant on whose behalf relief was allegedly sought, but whose entire corporate structure would have been disrupted if the plaintiffs had succeeded, has been represented by one set of counsel, Lee Warren James, one of the individual defendants, by other counsel, and the

remaining individual defendants by a third. In the Circuit Court of Appeals separate briefs were filed and separate arguments made by these respective counsel. This Brief will deal with points 2, 3, 4 and 5 of the Petition, which question the decision of the Circuit Court of Appeals on points briefed by counsel for the Company below. To permit a direct comparison with the Petition and Brief of Applicants, the same numbering will be used herein.

In their Statement of Proceedings in the Circuit Court of Appeals (Applicants' Brief, p. 11) no mention is made by Applicants of their petition for extension of time to file a petition for rehearing. Extensions were granted, but as there is no record of any petition having been filed within the extended time (III-15)*, they properly treat the judgment of the Circuit Court of Appeals, entered June 11, 1940, as final.

Position of this Respondent.

It is the position of this Respondent that no case has been presented requiring or justifying the exercise by

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* This Respondent was served with "Volume III" of the transcript of record, consisting only of the proceedings in the Circuit Court of Appeals and the extensions of time granted by this Court. Counsel for the individual defendants other than James was served with two other volumes, not entitled in this Court, and not numbered as volumes of the transcript. One of these consisted of the *brief and* appendix of appellants in the Circuit Court of Appeals (Applicants here) and the other of the appendix on behalf of all appellees in the Circuit Court of Appeals. It is assumed that appellants' appendix below is intended to be Volume I of the transcript and the appendix of appellees to be Volume II, and references are accordingly made.

this Court of its discretion to grant a writ of certiorari. The reckless charges of wrongdoing were completely disposed of by the findings of fact; and the questions of law were neither novel nor of general importance and were correctly decided in accordance with the applicable decisions and statutes.

The statement of points in the Petition and Brief of Applicants consists substantially of a mere paraphrase of Supreme Court Rule 38 (5). The "Statement" in the Petition is simply a summary of the original and amended bills of complaint, the allegations of which, insofar as they were in issue, were not sustained by any evidence and were squarely in conflict with the facts as found by the District Court, and concurred in by the Circuit Court of Appeals. The argument is a didactic statement that the decisions below were in conflict with numerous decisions of state courts, this Court and other Federal Courts. In no instance, however, is any attempt made by the Applicants to analyze the cases cited or to show by quotation or page reference that a conflict exists. No quotation from the Maryland statutes is made. Applicants seem again content to follow their previous practice of substituting "abuse for reasoning, and adjectives for record references." *McQuillen v. The National Cash Register Company,* 27 F. Supp. 639, 650.

It is the purpose of this Brief to demonstrate that there is no merit in points 2, 3, 4, 5 and 7; that the decisions of the trial Court and of the Circuit Court of Appeals are not in conflict with, but follow and apply, well established and controlling principles of law, and that no question calling for a review by certiorari is presented.

The number of citations appearing in Applicants' Brief* would lead to an unduly protracted brief if a detailed reply were to be made which took up the alleged authorities seriatim. This Brief will accordingly deal with the points in general terms. A further analysis of the citations is attached as part of the Appendix.

Summary of Points.

The argument on behalf of this Respondent will be developed under the following points:

2. *The application of Equity Rule 27 (Federal Rules of Civil Procedure 23(b)) was in harmony with the decisions of this Court and of the Maryland Court of Appeals.*

3. *The decision requiring representation of holders whose shares are sought to be cancelled correctly applied well-established principles of law.*

4. *The Courts correctly limited the scope of depositions under Rule of Civil Procedure 30(b).*

5. *The decision upholding the 1932 recapitalization properly applied the applicable Maryland law.*

7. *The decisions of the lower Courts correctly followed the decisions of this Court on Points 2 and 3; Point 5 is a matter of Maryland law only.*

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* In point 2 there are 36 citations; in point 3 there are 31; in point 4 there are 17, and in point 5 there are 16.

ARGUMENT.

2.

THE APPLICATION OF EQUITY RULE 27 (FEDERAL RULES OF CIVIL PROCEDURE 23(b)) WAS IN HARMONY WITH THE DECISIONS OF THIS COURT AND OF THE MARYLAND COURT OF APPEALS.

The complaint as originally filed (Record before the Circuit Court of Appeals, p. 1) and amended complaint (Record I, pp. 1, 57) affirmatively alleged that the plaintiffs "first acquired [stock of the Company] on or about June 20, 1928." Additional stock was purchased by plaintiffs on or about January 10, 1929 (I, 1). The Circuit Court of Appeals accordingly affirmed the order of the District Court striking from the complaint all allegations and prayers for relief with respect to transactions prior to June 20, 1928. In so doing both Courts merely applied the unequivocal provisions of Equity Rule 27 (now F. R. C. P. 23(b)) that:

> "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation * * * must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains * * *."

The decisions of this Court, of the Circuit Courts of Appeals and of the District Courts have uniformly *and without exception* applied this rule without qualifications in cases such as this. None of the Federal decisions cited by the Applicants is to the contrary, and counsel for this Respondent know of none. The Federal decisions cited by the Applicants fall into the following general classes:

1. Those which directly recognize and apply the rule as written, e. g.

Venner v. Great Northern R. Co., 209 U. S. 24, 33-34,
Dimpfel v. Ohio, etc., R. Co., 110 U. S. 209, 210,
Quincy v. Steel, 120 U. S. 241, 246.

2. Those which deal with another portion of the rule, requiring an effort to be made to secure action from the directors or stockholders, or an explanation for the failure to make such effort; e. g.

Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 445,
American Creosote Works v. Powell, 298 F. 417, 420 (C. C. A. 5, La. 1924).

3. Those holding that in cases *removed* to the Federal courts solely on the ground that a Federal question is involved, or begun in the Federal courts because of such question, the requirement of ownership at the time of the transaction attacked will not be applied; e. g.

Hand v. Kansas City, Southern Ry. Co., 55 F. 2d 712, 714 (D. C. N. Y., 1931).
Ball v. Rutland R. Co., 93 F. 513, 515 (C. C. Vt., 1899).
Lindsley v. Natural Carbonic Gas Co., 162 F. 954, 957 (C. C. N. Y., 1908).
Jablow v. Agnew, 30 F. Supp. 718, 719 (D. C. N. Y., 1940).

Whether or not the cases in this last group are correctly decided is an interesting question but one not in any way involved in this case. Even the New York district courts recognize that in a case removed on the

grounds of diversity of citizenship, the provisions of Equity Rule 27, F. R. C. P. 23(b) apply.

Venner v. Great Northern Ry. Co., 153 F. 408, 418.
Jacobson v. General Motors Corporation, 22 F. Supp. 255, 257, 258 (D. C. N. Y., 1938).*
Hitchings v. Cobalt Central Mines Co., 189 F. 241, 243 (C. C. N. Y., 1910).

The above cases and all the authorities cited by the Applicants under this point are analyzed (Appendix, pp. 28-32).

There is accordingly no conflict but a complete harmony with the decisions of this Court and the rules promulgated by it; i. e., the Equity Rules and the Rules of Civil Procedure.

The Circuit Court of Appeals found it unnecessary to determine whether or not since *Erie Railroad Co. v. Tompkins*, 304 U. S. 69, and *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, it would be necessary to follow the applicable State rule, as it found that "the Maryland doctrine is in line with the rule" uniformly followed by the Federal courts before those decisions (III, 9). Applicants apparently concede that Equity Rule 27 and its counterpart, F. R. C. P. 23(b) are procedural and not substantive (Applicants' Brief, p. 21). The promulgation of the new rules after the *Erie* and *Ruhlin* decisions would certainly indicate that they are procedural. The Federal decisions since the *Erie* and

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* Messrs. Arthur Berenson and Bernard Berenson who appear as of counsel on this Application were also of counsel in the *Jacobson* case.

Ruhlin cases have treated the rules as unaffected by those decisions,

> Wales v. Jacobs, 104 F. 2d 264, 267 (C. C. A. 6, decided June 6, 1939),
> Rinn v. Asbestos Mfg. Co., 101 F. 2d 344, 345 (C. C. A. 7, decided November 22, 1938, rehearing denied February 16, 1939),

even in New York where the state law is to the contrary.

> Summers v. Hearst, et al., 23 F. Supp. 986, 992 (D. C. N. Y., 1938),
> Bachrach v. General Investment Corporation, 29 F. Supp. 966, 967 (D. C. N. Y., 1939).

If, however, the question is one of substantive law, the Circuit Court of Appeals was clearly right in holding that the Maryland doctrine is in line with the Federal rule.

In *Matthews v. Headley Chocolate Co.*, 130 Md. 523, this question was presented to the Court in a manner requiring a direct decision. Demurrers had been sustained to a bill below in the name of the corporation to recover for allegedly excessive salaries paid the former officers, prior to the acquisition of stock by the real plaintiffs. The decision turned primarily upon the proposition that transferees from alleged wrongdoers could not themselves complain of or recover for such wrongs, but the Court entered into a lengthy discussion (pp. 531-534) "as to whether a shareholder who becomes such after the acts complained of were committed can sue * * *", holding that he could not; that a suit in the name of the corporation could be brought, but for the benefit only of minority stockholders not transferees (p. 535) and "not

barred by laches, limitations, acquiescence or other way sufficient to bar them in equity" * * * (p. 537).

The Court quoted with approval from *Home Fire Insurance Co. v. Barber,* 67 Neb. 657, 93 N. W. 1024, that "Sound reason and good authority sustain the rule that a purchaser of stock can not complain of the prior acts and management of the corporation" (p. 531), and that the rule was not "based on jurisdictional considerations peculiar to the Federal courts and on obsolete common law doctrines" (p. 532). It considered but rejected the reasoning of the leading case to the contrary, *Pollitz v. Gould,* 202 N. Y. 11, 94 N. E. 1088, and in summary said (p. 534):

> "If this was a suit by stockholders, it would seem to us to be clear that holders of the stock who become such after the transactions complained of took place, should not be permitted to recover against the directors.* * *"

The same conclusion served as an alternative ground for the earlier decision in *Tompkins v. Sperry, Jones & Co.,* 96 Md. 560, 583-584.

The *Matthews* case also recognized and applied the general rule that transferees from an alleged wrongdoer cannot themselves complain of the alleged wrong. 130 Md. 523, 532-533, 535. In the case at bar, the complaint alleged that all the authorized A shares were originally issued to or immediately acquired by some of the individual defendants (I, 14, 17). The Petitioners therefore are transferees of the very persons of whose alleged wrongs they complain. This of itself constitutes a sufficient non-controversial ground for the decision of the Circuit Court of Appeals.

It is accordingly submitted that the Circuit Court of Appeals applied Equity Rule 27, F. R. C. P. 23(b) correctly, in harmony with the decisions of this Court, all other Federal decisions and those of the Maryland Court of Appeals, and that no basis has been presented requiring a review of this decision.

3.

THE DECISION REQUIRING REPRESENTATION OF HOLDERS WHOSE SHARES ARE SOUGHT TO BE CANCELLED CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES OF LAW.

In the case at bar the plaintiffs sought the cancellation of 238,000 shares of Common A stock authorized in December, 1932, to be issued to the holders of Common A stock "pro rata, not as a stock dividend but as a split-up of stock" (I, 171, 331, 345; II, 72). On or about December 30, 1932, these shares were distributed to all A shareholders, including the plaintiffs. The certificates for shares distributed to the plaintiffs were still, at the trial in January, 1939, held by them (II, 40) and there is no evidence that any other shareholder refused to accept, or returned, his certificates. Furthermore, all shareholders other than the Applicants have accepted dividends on the new Common stock which since April, 1934, has represented these shares. (II, 88; Finding of Fact 17.) Accordingly when the plaintiffs filed their bill in July, 1934, it was to attack a consummated transaction in which everyone except perhaps the plaintiffs had acquiesced.

The plaintiffs sought the cancellation of shares of A stock held by other holders who apparently wished to retain them, as they have not intervened, but have retained the certificates, and dividends. It would seem

elementary that under such conditions, the position of the plaintiffs was adverse to the other holders of A shares and that the certificates of these holders could not be cancelled unless such holders were joined or adequately represented.

Since July, 1934, the plaintiffs have been on notice that it was the contention of the Company that the holders of the A shares, or proper representatives thereof, were indispensable parties (Record before the Circuit Court of Appeals, pp. 48-54, 104-108). Neither the original bill nor the amended bill filed more than six months after such notice, alleged the ownership of any of these 238,000 A shares *at any time by any of the defendants.*

This suit was, as to this portion of the complaint, not a representative one, since the plaintiffs alone represented and constituted the only group seeking, or that has sought, cancellation of these shares. Applicants do not now claim that the suit was a representative one under Equity Rule 38. This contention was so conclusively answered by the trial Court (I, 89-90) that it appears to have been abandoned. Nor was the Corporation a representative of shareholders (whether upholding or attacking the issuance of such shares) for this was clearly a controversy between members of a class. The action for the cancellation of the 238,000 A shares was not a derivative suit—one in which a corporation has a right which it refuses to enforce, therefore plaintiffs may proceed in its name. A derivative suit necessarily involves a right of action by the corporation against some one; an adverse claim. The cases are clear that when the gravamen of the complaint consists of a vital conflict between different classes of stockholders,

or a conflict among stockholders of the same class, the corporation is not a proper "representative."

Baltimore, C. & A. Ry. Co. v. Godeffroy, 182 F. 525, 534 (C. C. A. 4, 1910).
Weidenfeld v. N. Pac. Ry. Co., 129 F. 305, 311-312 (C. C. A. 8, 1904).
Taylor v. Southern Pac. Co., 122 F. 147, 153-154 (C. C. Ky., 1903).
Hoole v. Great Western Railway Co., L. R. 3 Ch. App. 262 (1867).

The citations by Applicants do not support the claim that the result reached by the Circuit Court of Appeals, the cases relied upon by it, or the other cases cited, show a conflict with decisions of this Court, of the Circuit Court of Appeals, or with the weight of authority. The cases relied upon by the Circuit Court of Appeals do support the proposition that the rights of owners of, or claimants to an interest in, property cannot be destroyed without the joinder of such party and an opportunity to appear and defend. A stockholder is a necessary party to a suit to declare his stock void, or to affect his rights in or under such stock.

Of the cases relied upon by the Courts below, (I, 90-91, III, 9-10), the case of *Weidenfeld v. N. Pac. Ry. Co.*, 129 F. 305 (C. C. A. 8, 1904) contains perhaps the clearest statement to this effect. In that case the plaintiff, a minority stockholder, filed his bill seeking to have the Court declare void the formation of Northern Securities Company and the transfer of stock of the defendant company to it. The Securities Company was not made a party. In dismissing the bill for failure to join and serve this indispensable party, the Court said (pp. 310-311):

"The remaining contention of appellant, necessary to be considered, is that the Circuit Court erred in

holding that the securities company was an indispensable party to the suit, and that in its absence the intervening petition could not be maintained. The theory of the appellant is that, as an individual stockholder, he can maintain a suit against his corporation as sole defendant to prevent it from commencing or continuing the doing of those things which are beyond its corporate powers, are in violation of law, and which may lead to a forfeiture of its corporate franchises; that, in respect of the charges made in his intervening petition and the relief sought thereby, the defendant company may stand as the sole representative in the suit of all of the stockholders, including the securities company, and that, therefore, the presence of the latter may be dispensed with. But appellant ignores the force of the pressing and insistent fact that the very thing of which he complains is primarily the ownership by the securities company of a majority of the stock of the defendant, and the end which he is seeking is the destruction of its title and its status as a stockholder. It is of the foundation of our jurisprudence that the rights of a person shall not be directly affected by a judicial proceeding to which he is not a party, and in which he cannot be heard for their defense and protection. Out of this principle has grown the rule, always recognized and enforced, that a suit will not be entertained in the absence of a person who has an interest in the controversy of such a nature that a final decree cannot be rendered without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Minnesota v. Northern Securities Company, 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; New Orleans Waterworks v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; California v. Southern Pacific Company, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; Christian v. Railroad, 133 U. S. 233, 10

> Sup. Ct. 260, 33 L. Ed. 589; Ribon v. Railroad Companies, 16 Wall. 446, 21 L. Ed. 367; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Taylor v. Southern Pacific Company (C. C.) 122 Fed. 147; Hollifield v. Railroad Company, 99 Ga. 365, 27 S. E. 715; Joslyn v. St. Paul Distilling Company, 44 Minn. 184, 46 N. W. 337. Taylor v. Southern Pacific Company, Hollifield v. Railroad Company, supra, and the case at bar, are identical in important and controlling features. In each case the complainant was a minority stockholder of the defendant corporation, and in each case the complainant undertook to lay the ax at the root of the title of an absent stockholder. In the two cases cited it was held that the presence of a stockholder whose rights were attacked was indispensable to the accomplishment of the complainant's purpose."

At least ten of the cases cited by Applicants have no apparent bearing whatever upon the question of joinder of parties defendant. Others directly support the position of the trial Court and the Circuit Court of Appeals. In still others, the plaintiff was acting only on his own behalf.

Other citations indicate a complete lack of appreciation of the fundamental difference between the instant case and cases in which an injunction is sought to prevent a *proposed* change in corporate structure alleged to be fraudulent, *ultra vires* or illegal. In such cases the personal interest of any stockholder seeking to prevent such unauthorized action is sufficient. Such a case was the *nisi prius* decision in *Tri-Continental Corporation, et als. v. The Chesapeake Corporation, et al.*, in the Circuit Court No. 2 of Baltimore City (The Daily Record, Baltimore, August 17, 1937). There, stockholders in their

own right sought to enjoin the two defendant corporations from taking action to consolidate on terms alleged to be both unfair and illegal. Both parties to the proposed consolidation were joined as defendants.

Applicants also cite a number of cases holding that the situs of stock at the domicile of the corporation constitutes a *res* permitting substituted service under 28 USC, §118 (Judicial Code, sec. 57). But that is exactly what the trial Court decided in this case, on a motion for such service (13 F. Supp. 53). These cases further recognize that while the presence of the *res* permits the use of substituted service, the persons interested in the *res* must be made parties defendant, and must be served in the manner provided in §118. The plaintiffs, however, made no effort to comply with this section as to any person claiming to be a holder of A stock.

The cases cited by Applicants are further analyzed and classified in the Appendix hereto (pp. 33-36).

If the Applicants had made an honest effort to name as defendants a group fairly representative of the holders of A shares (*American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 F. 598, 607) and had served them as required by 28 USC, §118, a different question of representation might fairly have been raised. It is submitted, however, that in a contest between the plaintiffs on one side and all other holders of A shares on the other, the Courts below correctly dismissed this portion of the complaint for failure to join indispensable parties. These decisions were in entire harmony with elementary principles of law as to which there is no conflict, and no occasion for review is presented.

4.

THE COURTS CORRECTLY LIMITED THE SCOPE OF DEPOSITIONS UNDER RULE OF CIVIL PROCEDURE 30(b).

The trial Court by its orders previously mentioned had properly limited the scope of the complaint to two issues—the 1932 recapitalization and the Deeds option. Shortly before the time set for trial, plaintiffs served notice of intention to take depositions, and a notice to produce. This Respondent was included among those to be examined. From the Schedule attached to the subpoena duces tecum (Record before Circuit Court of Appeals, pp. 402-417), it was clearly apparent that the plaintiffs intended to examine by deposition in the same manner as if the entire complaint were before the Court for hearing on the merits. Applicants admitted in their Brief before the Circuit Court of Appeals (p. 14) that the notice to produce covered "all transactions including those stricken."

Under the Federal Rules of Civil Procedure pursuant to which notice of the depositions was given, the Court had full authority to pass an order limiting the scope of the depositions. The relevant portions of Rule 30(b) read as follows:

> "(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order * * * that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters * * *; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression."

The Court in limiting the depositions properly confined the inquiry to those matters which were "relevant to the subject matter in the pending action" (Rule 26(b) F. R. C. P.). The order was properly within the sound discretion of the Court (III, 10).

See Rose Silk Mills, Inc. v. Insurance Company of North America, 29 F. Supp. 504, 505-506 (D. C. N. Y., 1939).

Union Central Life Insurance Company v. Berger, 27 F. Supp. 556, 557 (D. C. N. Y., 1939).

2 Moore, Federal Practice, sec. 30.03, p. 2577.

Rule 26 is largely patterned on New York procedure with respect to examination before trial. The New York cases make it entirely clear that such examination requires good faith and is limited to the "matters in issue."

Hubschman v. Hornstein, 241 App. Div. 531, 272, N. Y. S. 709, 710 (1934).

In re Dale's Will, 159 Misc. 578, 288 N. Y. S. 564, 566 (1936).

Moreover, despite the limitation imposed by the Court, the plaintiffs did in substance extend their inquiry into the matters stricken from the bill, under the guise of giving the background out of which arose the 1932 recapitalization and the employment of Deeds.* They

* The following matters excluded from the complaint by the orders of June 16, 1937, and June 30, 1938, were inquired into by the depositions taken by the plaintiffs, as shown by the Narrative Statement:

Ownership of B stock, Narrative Statement, Record before the Circuit Court of Appeals, pp. 430-431, 480, 481, 483, 488, 491, 498, 505, 507-508, 510.

150,000 B shares for employees, pp. 431-432, 472, 480, 488-489, 490-492, 498, 499-500.

Original issuance of stock in 1926, pp. 432-434, 471-472, 489, 491-492, 498, 499-500, 505.

therefore were not in any event harmed by the ruling of the Court.

None of the cases cited by Applicants on this point involved Federal Rules of Civil Procedure 26 or 30, any analogous provision, or a situation in which the Court had by previous orders limited the scope of the complaint. Most of them involved the proposition, not before this Court, that a fiduciary cannot make a profit out of a trust estate, particularly by the use of corporate funds for private purposes. The cases are classified in the Appendix hereto (pp. 37-38).

It is submitted that the decision of the Circuit Court of Appeals holding that the trial Court had properly exercised its discretion and that no harm could have resulted to the Applicants from it, was correct and presents no occasion for review, particularly since the Circuit Court of Appeals affirmed the orders limiting the issues.

5.

THE DECISION UPHOLDING THE 1932 RECAPITALIZATION PROPERLY APPLIED THE APPLICABLE MARYLAND LAW.

The decision of this question turns on the particular charter provisions of The National Cash Register Company and the application to them of the Maryland Corporation Law. It is submitted that the Courts below correctly construed the Maryland statutes and correctly applied them to the charter provisions involved.

The 1932 recapitalization of the Company, advised by the board of directors and approved by the vote of the requisite number of shares, effected (II, 86)

1. A reduction in the amount of issued capital stock.

2. "The issuance of 238,000 new shares of Common A stock to the holders of record of Common A stock pro rata, not as a stock dividend, but as a split-up."

3. The amendment of Articles FIFTH and SIXTH of the charter so as to authorize 200,000 shares of Common C stock with the same rights as to dividends, distribution on dissolution and voting rights as the Common A stock, and to be issued in exchange for Common B stock at the rate of one share of C for two shares of B (II, 86).

The question of the reduction of the amount of issued capital stock is not mentioned in Applicants' Brief. It was in any event, conclusively answered by the Courts below (I, 112; III, 11).

With the dismissal of the claim for the cancellation of the 238,000 A shares because of non-joinder of indispensable parties defendant, that question was no longer before the Courts for decision. The trial Court did, however, consider it in connection with the general question of the fairness and legality of the recapitalization and entertained no doubts as to its validity (I, 111). Most of Applicants' attack is against this issue, upon the unfounded assertion that this stock was issued in lieu of accrued dividends. How Applicants or any A shareholders could be harmed by a pro rata split-up is not apparent. Furthermore, the basis upon which the legality of the issuance of the C shares was decided, would likewise be controlling on the validity of the issuance of the 238,000 A shares.

The background of the 1932 recapitalization, the need for it, its fairness, the constituent steps by which it was effected, and its legality, are fully discussed in the opin-

ion of the trial Court (I, 101-113; II, 81-82). The question of fairness, involving only matters of fact, was decided adversely to the plaintiffs by the District Court after a full analysis, and these findings were concurred in by the Circuit Court of Appeals (III, 11). No effort is made by Applicants to point out any error in this ruling nor is this Court referred to any portion of the record which is claimed to be in conflict, or to justify a different conclusion.

On the question of legality the Courts below decided that adequate charter and statutory power existed for the authorization and issuance of the new stock. The applicable statutory and charter provisions are discussed by the Court (I, 107-108). The charter provisions appear in the record (I, 313-322); the statutory provisions (not quoted by Applicants) are set forth in the appendix hereto at pp. .

The gravamen of Applicants' present complaint (Applicants' Brief, pp. 26-29) seems to be that the procedure taken in the recapitalization deprived the plaintiffs of so-called contract rights and, specifically, of the "right" to accrued dividends, for the payment of which on the plaintiffs' theory no surplus existed (Applicants' Motion, p. 5). The Court found that the distribution of 238,000 A shares was an authorized split-up of stock (I, 111; II, 87—Finding 13). There is nothing whatever other than unsupported inferences by plaintiffs' counsel (see II, 38) to justify the statement that this stock was issued in lieu of accrued dividends.

However, even if the effect of the recapitalization were to extinguish accrued dividends or change "contract rights", the Courts' decisions in favor of the legality of

the plan were correct. If an adequate reservation is made, the power to change even contract rights may itself be a "contract right." Certainly since the concurring opinion of Mr. Justice Story in *Trustees of Dartmouth College v. Woodward*, 4 Wh. 518, 712, it has been perfectly clear that a power to affect contract rights can be reserved. Most of the cases cited by Applicants expressly so state, and none of them denies it. Applicants' Brief admits that under Section 28 of Article 23 of the Maryland Code of Public General Laws a corporation may in its charter reserve the right to change the contract rights of shareholders (Applicants' Brief, p. 29). The only question therefore is whether the right was reserved to authorize and issue the shares of stock involved. None of the cases cited by Applicants involved the Maryland statutory provisions or a charter similar to that of the Company. They, therefore, can be of no assistance in determining whether or not under that law and that charter such a reservation was effected.

Section 28 of Article 23 of the Maryland Code provides for charter amendments to accomplish many purposes, including:

> "* * * the classification or reclassification of all or any part of the capital stock; and the making of any other amendment of the charter that may be desired, provided that such amendment shall contain only such provisions as it would be lawful or proper to insert in an original certificate of incorporation made at the time of making such amendment. No amendment of the charter of a corporation shall be valid which changes the terms of any of the outstanding stock by classification, reclassification or otherwise, in the absence of a reservation in the charter of the right to make such amend-

> ment, unless such change in the terms thereof shall have been authorized by the holders of all of such stock at the time outstanding, * * *. The word 'terms' as used in this Section in reference to stock is intended to mean only the contract rights of the holders thereof as expressed in the charter and shall be so construed."

Section 23 of Article 23 permits *"any action"* which can be taken at stockholders' meetings, to be "taken or authorized by such vote of its stockholders or members as may be required for such action by its charter", provided that it is not less than a majority in number of the aggregate number of votes to which the holders of all the shares of all classes in the aggregate outstanding and entitled to vote, are entitled. Under this authorization, Article ELEVENTH of the charter provides that "any action" of stockholders may be taken by the "vote of the holders of two-thirds of the outstanding shares of the Common A Stock and the Common B Stock, considered as a single class."

Article SEVENTH of the charter provides that the Company may upon such vote of two-thirds of the A and B shares, considered as a single class:

> "(b) authorize one or more additional classes of stock, with such designations, preferences, voting powers, restrictions and qualifications as may be determined or authorized by such vote, which may be the same as or different from the designations, preferences, voting powers, restrictions and qualifications of the classes of stock of the Corporation then authorized or issued and outstanding, * * *.
>
> "No holder of any stock of the Corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of the Corporation, or any additional stock of any class to be issued pur-

> suant to any increase of the authorized stock of the Corporation, * * * but any such unissued stock or any such authorized additional stock or securities convertible into stock, shall be issued and disposed of in such manner and subject to such terms, restrictions and provisions as may be determined by, and only by, the vote of a majority of the Board of Directors approved or authorized by vote of the holders of two-thirds of the outstanding shares of the Common A Stock and the Common B Stock, considered as a single class, at a meeting called for that purpose."

The charter, therefore, specifically authorizes a new class of stock (such as the C stock) "with *such* designations, preferences, voting powers, restrictions and qualifications" as may be desired, which may be the "same as or different from" those of the A and/or B shares. It directly authorizes the creation and issuance of a new class (C, or any other designation) with the same rights as the Common A stock—exactly what was done. It would have permitted the issuance of a class of stock having priority over the A shares, instead of simple equality with them. Article SEVENTH would also have permitted the same result through the issuance of convertible securities instead of by way of an exchange. Articles SEVENTH and ELEVENTH in connection with Sections 23 and 28 of Article 23 of the Code authorized the adoption of the amendments and the issuance of the shares by the combined vote of the holders of two-thirds of the shares of the Common A stock and Common B stock, outstanding and entitled to vote, considered as a single class. This vote was received (II, 87).

The statement that the decisions below conflict with *Tri-Continental Corporation, et als. v. The Chesapeake*

Corporation, et al., (Circuit Court No. 2 of Baltimore City, The Daily Record, August 17, 1937), is incorrect. Applicants carefully fail to point out the nature of the supposed conflict or to quote from that case any language purporting to establish the point for which they contend. They are not sufficiently familiar with the case even to give a correct citation.* The case was one in which a proposed consolidation was enjoined on the grounds both that the proposed plan was unfair and that it was unlawful. The only relevant portion of the opinion is set out in the appendix (pp. 41-42). From this it is clear that the consolidation attempted to change terms of the preferred stock (reduction of the dividend rate, modification of the cumulative feature and reduction of redemption price), in the teeth of an express charter provision that the powers of directors and stockholders *could not* be "exercised to abrogate or alter any of the terms" of that particular class. It obviously has no bearing on this case in which the charter provisions authorize, not prohibit, the action taken.

No effort is made by Applicants to show how any of the cited cases** are relevant, much less controlling. They

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* The parties are reversed, the name of the Court and of the Judge are incorrectly given and the case is said to have been decided nine days before it was filed.

**Applicants are decidedly less than fair in challenging the statement of the lower Court as to the absence of relevant decisions (II, 8). The Court correctly stated that the precise question "as affected by the Maryland statute" had not been considered in a reported decision of the Maryland Court of Appeals or by a Federal Court, although the question as affected by statutes of other states had been before the Courts. The Judge could have added that the charter provisions in question had never previously been before any Court.

do not purport to consider either the Maryland statute or the charter of the Company. Manifestly cases under different statutory and charter provisions are of no help. None of these cases denies, and most of them expressly recognize, that the right to change terms can be reserved. The question is one of the adequacy of the reservation. A single striking illustration will serve to show the inaccuracy of the generalizations attempted by Applicants. *Keller v. Wilson & Company,* 190 A. 115 (Del. Sup. 1936) held that "vested rights" could not be changed as to particular non-acquiescing plaintiffs, because of lack of what the Court considered to be an adequate charter reservation under the Delaware law. That same Court, however, has explicitly recognized that the holding in the *Keller* case is limited to a right "accorded protection when the corporation was formed and the stock was issued * * *." Where the reservation of a right to change terms exists when the stock is issued, the shareholder is bound thereby. *Federal United Corporation v. Havender,* 11 A. 2d 331, 338, 339 (Del. Sup. 1940).

It is accordingly submitted that the Courts below correctly construed the Maryland statutes and correctly applied the cited charter provisions. The decision on its face is sound and conflicts with no other authority. As it has reference to a specific charter, this decision of the local law affords little or no opportunity for precedent, and does not involve a matter of general interest or importance.

7.

THE DECISIONS OF THE LOWER COURTS CORRECTLY FOLLOWED THE DECISIONS OF THIS COURT ON POINTS 2 AND 3; POINT 5 IS A MATTER OF MARYLAND LAW ONLY.

Applicants as Point 7 claim that there is no decision of this Court which settles or determines the law on the issues raised in their Motion, more especially as to Points 1, 2, 3 and 5. It is difficult to reconcile this with the grounds urged under those particular points as reasons for granting certiorari. Under Point 2, the decisions of the lower Courts are claimed to be opposed "apparently to decisions of this Court". Under Point 3, the decisions below are claimed to conflict with "decision of this Court or with other C. C. A.s."

The decisions below on Point 2 are in accord with the decisions of this Court.

Venner v. Great Northern R. Co., 209 U. S. 24, 33-34.
Quincy v. Steel, 120 U. S. 241, 246.
Dimpfel v. Ohio, etc., R. Co., 110 U. S. 209, 210.

See:

Hawes v. Contra Costa Water Co., 104 U. S. 450, 461.

The decisions below on Point 3 are in accord with the decisions of this Court.

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 8.
Minnesota v. Northern Securities Co., 184 U. S. 199, 235.
General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 262, 285.

Point 5 involves the construction of the charter of this Respondent, and the corporation laws of Maryland. This specific question has never been presented to the Courts before. For the reasons heretofore advanced it is submitted that the decisions of the lower Courts were correct.

CONCLUSION.

It is respectfully submitted that all the contentions of Applicants are entirely without merit, and that no reason has been advanced calling for a further review of the questions correctly decided below.

JAMES PIPER,
Counsel for Respondent,
The National Cash Register Company.

R. DORSEY WATKINS,
of the Baltimore, Md., Bar,

CHAUNCEY B. GARVER,
of the New York Bar,
Of Counsel.